

STATE OF CALIFORNIA
AGRICULTURAL LABOR RELATIONS BOARD

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|---------------------------|---|----------------------|
| SUPERIOR FARMING COMPANY, |) | Case No. 80-CE-172-D |
| |) | 81-CE-7-D |
| Respondent, |) | |
| |) | |
| and |) | |
| |) | 8 ALRB No. 77 |
| LUIS RAMIREZ and |) | |
| DAGOBERTO O. GONZALES, |) | |
| |) | |
| Charging Parties. |) | |

DECISION AND ORDER

On April 2, 1982, Administrative Law Officer (ALO) Brian Tom issued the attached Decision in this proceeding. The General Counsel and Respondent each timely filed exceptions and a supporting brief, and Respondent filed a reply brief.

Pursuant to the provisions of Labor Code section 1146, the Agricultural Labor Relations Board (Board) has delegated its authority in this matter to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs submitted by the parties and has decided to affirm the ALO's rulings, findings,^{1/}

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^{1/}Respondent excepted to the ALO's credibility resolutions in this matter. We will not disturb an ALO's credibility resolutions, to the extent that such resolutions are based upon demeanor, unless the clear preponderance of the relevant evidence demonstrates that they are incorrect. (Adam Dairy dba Rancho Dos Rios (Apr. 26, 1978) 4 ALRB No. 24; El Paso Natural Gas Co. (1971) 193 NLRB 333 [78 LRRM 1250]; Standard Dry Wall Products (1950) 91 NLRB 544 [26 LRRM 1531].) We have reviewed the record and find the ALO's credibility resolutions to be supported by the record as a whole.

and conclusions^{2/} as modified herein, and to adopt his recommended Order, with modifications.

We affirm the ALO's recommended dismissal of the allegation that Respondent violated section 1153(a) of the Agricultural Labor Relations Act (Act) by discharging Jose Garcia, but we disagree with his rationale. He recommended dismissal of that allegation because Garcia did not testify at the hearing. As we noted in George Lucas and Sons (Oct. 23, 1979) 5 ALRB No. 62, the testimony of the discriminatee or other victim of an unfair labor practice is not an essential element in proving a violation of the Act. Evidence from other sources is often sufficient to prove a prima facie case. However, based on our review of the record, we find that General Counsel has failed to adduce sufficient evidence to establish a prima facie case of a violation with respect to Garcia's discharge, and we hereby dismiss that allegation of the complaint.

ORDER

By authority of Labor Code section 1160.3, the Agricultural Labor Relations Board (Board) hereby orders that Respondent Superior Farming Company, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

^{2/}We need not address the ALO's conclusion that Respondent's refusal to reinstate Dagoberto O. Gonzalez on September 24, 1980, constituted an additional violation of section 1153(a) of the Agricultural Labor Relations Act as it would not affect our remedial Order herein. In any event, Respondent's backpay liability begins on September 23, 1980, the day it discharged Gonzalez because of his protected activity. (See Abilities and Goodwill, Inc. (1979) 241 NLRB 27 [100 LRRM 1470].)

(a) Discharging, laying off, or otherwise discriminating against, any agricultural employee in regard to hire or tenure of employment because he or she has engaged in any concerted activity protected by section 1152 of the Agricultural Labor Relations Act (Act).

(b) In any like or related manner interfering with, restraining, or coercing any agricultural employee in the exercise of the rights guaranteed them by section 1152 of the Act.

2. Take the following affirmative actions which are deemed necessary to effectuate the policies of the Act:

(a) Offer to Dagoberto O. Gonzalez immediate and full reinstatement to his former or substantially equivalent position, without prejudice to his seniority or other employment rights or privileges.

(b) Make whole Dagoberto O. Gonzalez for all losses of pay and other economic losses he has suffered as a result of his discharge on September 23, 1980, such amounts to be computed in accordance with established Board precedents, plus interest thereon, computed in accordance with our Decision and Order in Lu-Ette Farms, Inc. (Aug. 18, 1982) 8 ALRB No. 55.

(c) Preserve and, upon request, make available to this Board and its agents, for examination, photocopying, and otherwise copying, all payroll records, social security payment records, time cards, personnel records and reports, and all other records relevant and necessary to a determination, by the Regional Director, of the backpay period and the amount of backpay due under the terms of this Order.

(d) Sign the Notice to Agricultural Employees attached hereto and, after its translation by a Board agent into all appropriate languages, reproduce sufficient copies in each language for the purposes set forth hereinafter.

(e) Mail copies of the attached Notice, in all appropriate languages, within 30 days after the date of issuance of this Order, to all agricultural employees employed by Respondent at any time during the period from September 23, 1980, to December 31, 1980.

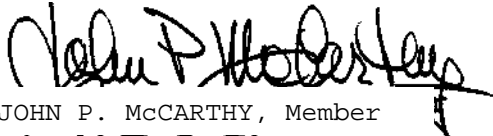
(f) Post copies of the attached Notice, in all appropriate languages, in conspicuous places on its property for 60 days, the time(s) and place(s) of posting to be determined by the Regional Director, and exercise due care to replace any Notice which has been altered, defaced, covered or removed.

(g) Arrange for a representative of Respondent or a Board agent to distribute and read the attached Notice, in all appropriate languages, to all of its agricultural employees on company time and property at time(s) and place(s) to be determined by the Regional Director. Following the reading, the Board agent shall be given the opportunity, outside the presence of supervisors and management, to answer any questions the employees may have concerning the Notice and/or their rights under the Act. The Regional Director shall determine a reasonable rate of compensation to be paid by Respondent to all nonhourly wage employees in order to compensate them for time lost at this reading and during the question-and-answer period.

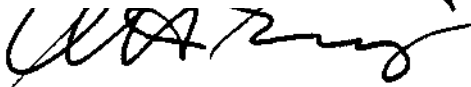
(h) Notify the Regional Director in writing, within

30 days after the date of issuance of this Order, of the steps Respondent has taken to comply therewith, and continue to report periodically thereafter, at the Regional Director's request, until full compliance is achieved.

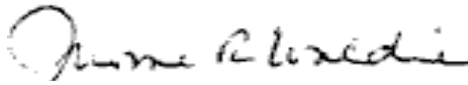
Dated: October 19, 1982

A handwritten signature in black ink, appearing to read "John P. McCarthy".

JOHN P. McCARTHY, Member

A handwritten signature in black ink, appearing to read "Alfred H. Song".

ALFRED H. SONG, Member

A handwritten signature in black ink, appearing to read "Jerome R. Waldie".

JEROME R. WALDIE, Member

NOTICE TO AGRICULTURAL EMPLOYEES

After investigating charges that were filed in the Delano Regional Office, the General Counsel of the Agricultural Labor Relations Board (Board) issued a complaint which alleged that we, Superior Farming Company, had violated the law. After a hearing at which each side had an opportunity to present evidence, the Board found that we did violate the law by discharging employee Dagoberto O. Gonzalez because of his protected concerted activities. The Board has told us to post and publish this Notice. We will do what the Board has ordered us to do.

We also want to tell you that the Agricultural Labor Relations Act is a law that gives you and all other farm workers in California these rights:

1. To organize yourselves;
2. To form, join, or help unions;
3. To vote in a secret ballot election to decide whether you want a union to represent you;
4. To bargain with your employer about your wages and working conditions through a union chosen by a majority of the employees and certified by the Board;
5. To act together with other workers to help and protect one another; and
6. To decide not to do any of these things.

Because it is true that you have these rights, we promise that:

WE WILL NOT hereafter discharge, lay off, or in any other way discriminate against, any agricultural employee because he or she has engaged in protected concerted activities.

WE WILL reinstate Dagoberto O. Gonzalez to his former or substantially equivalent employment, without loss of seniority or other privileges, and we will reimburse him for any pay or other money he has lost as a result of his discharge on September 23, 1980, plus interest.

Dated:

SUPERIOR FARMING COMPANY

By:

Representative

Title

If you have a question about your rights as farm workers or about this Notice, you may contact any office of the Agricultural Labor Relations Board. One office is located at 627 Main Street, Delano, California, 93215. The telephone number is (805) 725-5770.

This is an official Notice of the Agricultural Labor Relations Board, an agency of the State of California.

DO NOT REMOVE OR MUTILATE.

CASE SUMMARY

Superior Farming Company
(Luis Ramirez and Dagoberto O. Gonzalez)

8 ALRB No. 77
Case Nos. 80-CE-172-D
81-CE-7-D

ALO DECISION

The ALO found that the Respondent violated section 1153(a) of the Act by discharging an employee (Gonzalez) because he engaged in protected concerted activities when he joined with other tractor drivers in refusing to remove leaves from the grapes in his gondola in order to protest a change in the Respondent's unloading procedure that resulted in a reduction in the employees' wages. However, the ALO recommended dismissal of the allegation that the Respondent violated the Act by discharging a member of the tractor driver's crew, finding that the Respondent did not discharge the worker, but rather that the employee had refused to work and thereby became an economic striker. The ALO also recommended dismissal of an allegation concerning another member of the tractor driver's crew because the worker did not testify at the hearing.

The ALO found that General Counsel failed to present a prima facie case that Respondent violated section 1153(a) of the Act by discharging two grape pruners because they had engaged in protected concerted activity, and granted the Respondent's motion to dismiss that allegation at the hearing.

BOARD DECISION

The Board affirmed the ALO's rulings, findings, and conclusions, and adopted his recommended Order with modifications. The Board, however, disagreed with the ALO's recommended dismissal of an allegation based on the fact that the alleged discriminatee did not testify at the hearing. The Board noted that it is not essential that the discriminatee, or other victims of an unfair labor practice, testify at the hearing, and pointed out that evidence from sources other than the discriminatee is often sufficient to prove that a violation occurred as alleged. However, the Board found, based on its review of the record, that General Counsel failed to establish a prima facie case of a violation as to that alleged discriminatee, and therefore dismissed the allegation. The Board ordered reinstatement with backpay for employee Gonzalez.

* * *

This Case Summary is furnished for information only and is not an official statement of the case, or of the ALRB.

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STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

In the Matter of)

SUPERIOR FARMS,)

Respondent,)

and)

LUIS RAMIREZ and DAGOBERTO O. GONZALEZ,)

Charging Party.)

Case Nos. 81-CE-7-D
80-CE-172-D



Appearances:

Juan Arambala
Delano, California
for the General Counsel

Bert Hoffman
Quinlan, Kershaw, Fanucchi and Hoffman
Fresno, California
for the Respondent

DECISION OF THE ADMINISTRATIVE LAW OFFICER

STATEMENT OF THE CASE

BRIAN TOM, Administrative Law Officer:

This matter was heard before me on October 20, 21, 22, November 2 and 3, 1981, in Delano, California. Charge 80-CE-7-D was filed by Dagoberto Gonzalez (hereinafter "Dagoberto")^{1/} September 24, 1980^{2/}; Charge No. 81-CE-7-D was filed by Luis Ramirez (hereinafter "Ramirez") on January 14, 1981. The charges were consolidated by Order of the Regional Director on October 6, 1981, and a First Amended Consolidated Complaint was issued

1/. Reference to persons with a surname Gonzalez will be to their first name, as there are more than one Gonzalez.

2/. All dates are 1980, unless otherwise stated

on that date. Said Amended Complaint alleges, inter alia, that Superior Farms (hereinafter sometimes referred to as "Respondent") violated Section 1153(a) of the Agricultural Labor Relations Act (hereinafter the "Act") by the discriminatory discharge of various named employees. At the close of General Counsel's case, Respondent made a motion to dismiss that part of the Complaint based on Charge No. 80-CE-172-D insofar as employee Jose Garcia, was concerned. I granted said motion. At the close of the hearing, Respondent moved to dismiss that part of the Complaint based on Charge No. 81-CE-7-D involving Ramirez and Audelia Heredia (hereinafter "Heredia"). I granted said motion.^{3/}

All parties were given full opportunity to participate in the hearing. Respondent and General Counsel filed post-hearing briefs in support of their respective positions.

Upon the entire record, including my observation of the demeanor of the

3/. I granted this motion to dismiss on the grounds that Ramirez and Heredia's roles in the concerted activity, i.e. a request to increase the prevailing piece rate, was minor., at best. Ramirez, while working in the fields with other employees, motioned to Aurelio Menchacha (hereinafter "Menchacha"), a supervisor, to stop. A co-worker told Menchacha that the piece rate was low and should be increased. Menchacha agreed to look into it. The evidence was unclear what Heredia's role was or where she was located during this brief exchange. The evidence also indicated that it was the common practice at Respondent's ranch to request adjustments of the piece rate in this manner and that this method had been used often in the past without incident. In addition, Phil Nickel, the foreman who directly supervised Ramirez and Heredia and the person who issued the disciplinary notices which led to their discharge, was not shown to have any knowledge of Ramirez's or Heredia's role in the concerted activity. He denied having any such knowledge and given the brief and uneventful nature of the request for the piece rate increase, the routine and cooperative response of Menchacha to the request (which all parties agreed on) an inference that Nickel had knowledge of the incident is unreasonable. The General Counsel requested that the ruling on this motion be reconsidered and both Respondent and General Counsel fully briefed this issue in their post-hearing briefs; however, after reviewing the briefs and transcript, I am persuaded that my original ruling was correct and hereby affirm said ruling.

witnesses, I make the following:

FINDINGS OF FACT

I Jurisdiction

Respondent is a company engaged in agricultural operations in California, as was so admitted by Respondent. Accordingly, I find that Respondent is an agricultural employer within the meaning of Section 1140.4(c) of the Act.

At all times material herein, I find that Dagoberto and Rosalio Contreras (hereinafter "Contreras") were agricultural employees within the meaning of Section 1140.4(c) of the Act.

II The Alleged Unfair Labor Practice

The Complaint alleges, inter alia, that Respondent violated Section 1153(a) of the Act by terminating the employment of Dagoberto and Contreras on or about September 24, 1980, because they had engaged in concerted activity to obtain higher wages.

Respondent denies that it committed the alleged unfair labor practice.

FACTS

A Respondent's Operation

Respondent is a large farming operation divided into various "areas." Area Five, where the alleged incident took place, consists of some 5,000 acres used for the growing of grapes. These grapes are grown for the wine, table and raisin markets. Ron Wirth (hereinafter "Wirth") is the superintendent of Area Five. As superintendent, Wirth's duties were to oversee all farming operations in the assigned area, including all personnel problems.

The harvesting of the wine grapes in 'Area Five can be

described as follows: A large crew of workers is assigned to a "block" of a given ranch. This large crew is divided into a sub-crew of three or more persons each. Each sub-crew consists of one tractor driver and two or more pickers. The tractor driver has attached to his tractor a gondola in which the harvested grapes are placed. After the gondola is loaded, the tractor driver drives to an unloading area. The gondola is then weighed, unhitched, lifted into the air by a forklift and the grapes dumped into a waiting truck.

After the gondola is weighed, the tractor driver is given a slip of paper indicating the net weight of the grapes in the gondola. A copy of this weight slip is kept by the Respondent for its payroll records. At the end of the day, the net weight per sub-crew is tabulated. The pay for the employees is a piece rate based upon the amount of grapes picked with each member of a sub-crew receiving credit for a proportionate share of the total amount picked.

As part of the dumping process, foremen are stationed at the unloading site to see that leaves and other debris left there by the pickers are not dumped into the truck. If "material other than grapes" (MOG) is mixed in with grapes shipped to the winery at a level above 1 percent, the winery may pay less or reject a given shipment.

Anuar Gonzalez (hereinafter "Anuar") is the foreman directly in charge of Dagoberto's sub-crew. Benito Juarez (hereinafter "Juarez") is another forman working in the area.

B. The Concerted Activity and Termination of Dagoberto

Respondent's supervisors regularly admonished crew members

to "pick clean." However, On September 23, Respondent was even more concerned that the grapes be clean as the crew was starting in the Muscats, a variety of grape in which leaves get easily mixed in with the grapes. In addition to warning the crew to "pick clean" on that day, Respondent also modified his procedure at the unloading station. Whereas the prior practice had been to allow grapes in the entire gondola to be dumped in one motion, Respondent on that day started a procedure whereby the gondola was dumped in portions. Thus only a portion of the gondola would be emptied at a time and checked for MOG by the foreman. If the load contained too much MOG, the foreman would have the tractor driver or another employee clean the remaining part of the load before the next portion was unloaded. This process would continue until the gondola was emptied. This new procedure quite naturally resulted in a slowing down of the unloading process.

Dagoberto, after his sub-crew picked its first load of that day, drove to the unloading site where six to seven other tractor drivers were waiting to unload. The tractor driver immediately head of Dagoberto was Jose Manuel Medina (hereinafter "Medina").

While waiting in line to unload his grapes, Dagoberto noted that the new procedure required much more time to unload than the prior method. He then met with most of the other drivers who were waiting in line. They agreed that they wanted to return to the established practice of dumping grapes, as the new method of dumping in portions was too time consuming and would result in a reduction of their wages. They also agreed that they would refuse to climb up on the truck to clean the grapes as required under the new method.

Prior to Medina receiving his turn to dump his grapes, he had a conversation with Dagoberto. Dagoberto told Medina that it was okay not to climb up on the gondola to clean the grapes; that if he was fired for refusing to clean the grapes the other drivers would "back him up . " Medina then preceded to the unloading area. When he got there Anuar told him he would have to get up there to clean the leaves out. Medina replied that he was not going to do so. Anuar repeated his request and Medina again declined. After a short interval, Anuar decided to dump the grapes himself. After Medina's grapes were dumped, Medina drove his tractor out of the unloading area and parked it in order that the other tractors in line could move forward. Medina then left the area and went to his car which was parked away from the unloading area.

Dagoberto's turn was next, and he drove his tractor and gondola into the unloading area. By this time, he had been waiting in line between one to one and a half hours. Dagoberto's gondola was dumped in part when Anuar determined that Dagoberto's load had too many leaves. Anuar then ordered Dagoberto to climb up onto his gondola and clean the leaves. Dagoberto refused. Anuar continued to insist that Dagoberto clean the leaves, however, Dagoberto maintained his position. Dagoberto told Anuar that requiring him to clean the leaves was not beneficial to him; that the price being paid by Respondent was too low. Juarez also was present, and he joined the discussion. Juarez also insisted that Dagoberto climb onto the gondola and clean leaves, but Dagoberto refused Juarez's request.

At that point, Wirth was called on a CB radio and asked to

come to the unloading area. Wirth arrived and with Juarez acting as a translator, gave Dagoberto a "direct order" to clean out the leaves from the gondola. Dagoberto again refused saying that he would not and furthermore that the other drivers were not going to either. At that point, Wirth told Dagoberto that he was terminated, and that he had to leave Superior Farms' property.^{4/} Dagoberto then went and talked to some of the other drivers. Wirth considered the situation "volatile" and felt that the things may get out of hand as the other drivers were in agreement with Dagoberto's position. Wirth ordered the unloading operation shut down and asked everyone to leave the area. Javier Gonzalez Flores (hereinafter "Flores") was the tractor driver in line immediately behind Dagoberto. During this incident, Anuar asked Flores if he would clean the leaves in his gondola and he told Anuar he would not.

September 24

On the following day, Dagoberto along with the two members of his sub-crew, Jose Garcia (hereinafter "Garcia") and Contreras arrived on Respondent's property at 6:30 a.m. Dagoberto went up to Anuar and was told that he had orders not to give a tractor to Dagoberto. When the other workers found out Dagoberto was not going to be allowed to work, they decided not to work either, in support of Dagoberto. Some of the workers who had arrived ahead of Dagoberto and were already in the fields, also decided

4/. There is some dispute in the testimony as to whether Wirth terminated Dagoberto at that point. Gonzales claims that he did not talk to Wirth on September 23rd. However, I credit Wirth's statement (corroborated by Juarez and Anuar) and find that the termination took place on September 23rd.

to stop working as soon as they emptied a load. The workers then left Respondent's property.

The events of September 25 are summarized in the section below

C. The Alleged Discharge of Rosalio Contreras

Contreras was a part of Dagoberto's sub-crew during the time in question. On the 23rd of September, after Dagoberto's termination, Contreras left Respondent's property after being told by co-workers that there would be no more work that day. Contreras did not receive this information from any of Respondent's supervisors. On the 24th, Contreras returned to work with Dagoberto. Anuar's testimony, which I credit, indicates that he told Dagoberto that he had orders not to give the tractor to Dagoberto. He also told the other two workers of the sub-crew (Contreras and Garcia) that if they wanted to work, they could do so. However, Contreras said that if Dagoberto would not work, nobody would work. Both Contreras and Garcia along with the rest of the crew decided not to work that day. On the 25th of September, Contreras returned to the farm with Dagoberto. They were approached by a security guard who told Dagoberto that he was not to remain on company property. Dagoberto apparently agreed, and they remained on company property only long enough to pick up their checks. The record does not reflect the circumstances as to who requested that the checks be issued or why they were requested to be issued. During the 23rd, 24th and 25th of September, Contreras did not speak to any supervisory personnel, except Anuar on the 24th. On the 25th, the rest of the crew, except for Dagoberto's sub-crew, returned to work. The method of dumping grapes was changed back to the method

used before September 23.

ANALYSIS AND CONCLUSION

Section 1152 of the Act guarantees employees:

" . . . the right to self-organization to form join or assist labor organizations, to bargain collectively through representatives of their choosing and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection and shall also have the right to refrain from any or all such activities . . . "

Section 1153(a) makes it an unfair labor practice for an agricultural employer "to interfere with, restrain or coerce agricultural employees in the exercise of the rights guaranteed in Section 1152

The Discharge of Dagoberto Gonzalez

Concerted activity may be either protected or unprotected. Generally protected activities are those peacefully engaged in by employees in pursuit of their rights under Section 1152 of the Act. The Board has held that a work stoppage by two or more employees to protest wages paid is concerted activity protected by the Act. Tenneco West, Inc., 6 ALRB No. 53 (1980); Resetar Farms, 3 ALRB No. 18 (1977); Air Surrey, (1977) 229 NLRB 1064 [95 LRRM 1212].

In the Tenneco West, Inc., case, the employer refused to rehire a crew after a brief work stoppage to protest the wage rate. After the crew was ordered to begin working, the crew did not do so. Rather they discussed among themselves whether to accept the offered rate. After discussing the matter, they decided to go to work under the offered rate, but the employer refused to put the crew to work. Under these circumstances, the Board held that "Respondent's refusal to rehire the employees after their offer to return tended to interfere with the

employees' right to engage in protected activity, and was therefore a violation of Labor Code Section 1153(a)." Tenneco West, Inc., supra, p. 3.

Respondent argues that the issue is one of whether Dagoberto was discharged for insubordination or the refusal to obey a "direct order." Respondent's position is therefore that the concerted activity engaged in by Dagoberto loses its protected status because of Dagoberto's refusal to obey a direct order.

In support of this position, Respondent has cited a number of ALRB, NLRB and Federal court cases as precedent. Each of the cases relied on by Respondent will be discussed briefly.

Respondent initially relies on Sam Andrew's Sons, 5 ALRB No. 68 (1979) for the proposition that any employee who seeks to dictate the terms and conditions of his employment, is not engaged in protected activity. However, in the Sam Andrew's Sons case, the Board found that the cause of the discharge did not relate to any protected activity engaged in by the alleged discriminatee; rather the Board found that the alleged discriminatee did not engage in concerted activity, but that he individually decided not to work overtime as directed by his foreman. As the concurring opinion by Board member Ruiz points out, were the Board to have considered the refusal to work overtime as part of an earlier concerted activity, there would have been a violation of Section 1153(a) of the Act.

The facts in the instant case are different. Here Dagoberto was unquestionably engaged in concerted activity when he engaged in a work stoppage as a result of a change in work conditions which would have reduced his earnings.

Similarly, Respondent's reliance upon S & F Growers, ALRB no. 58 (1977) is misplaced as the Board held in that case that the cause for an employee's ten-day suspension was unrelated to concerted activity.

Respondent also cites several NLRB cases to justify Dagoberto's discharge. In Union Carbide Films Packaging, Inc., and. Union Independiente de Produccion y Mantenimiento, (1974) 209 NLRB 860, 86 LRRM 1191, an employee (Maysonet) sought to promote a work stoppage. In the course of doing so, Maysonet violated various company regulations, made improper use of the company's PA system and telephones, violated company instructions in going from section to section in the plant talking to employees while they were at work and engaged in insubordinate behavior. The national Board held that under such circumstances, the employers could lawfully discharge Maysonet.

In the instant case, there is no allegation that Dagoberto engaged in any improper conduct in the course of promoting a work stoppages. Rather, the evidence is clear that he sought the support of his fellow workers in a peaceful manner without any evidence of disruptive conduct, while waiting in line to unload his gondola.

Respondent relies on Huntsville Manufacturing Company and Communications Workers of America, AFL-CIO, (1974) 211 NLRB 54, 86 LRRM 1587, as precedent that Dagoberto was properly discharged. However, in the Huntsville Manufacturing case, the Board found that the protected activity did not lead to the discharge; rather the discharge was caused by a refusal to accept a work assignment, which was not related to a protected activity.

Respondent relies on the following circuit court cases to support his position: Liberty Mutual Insurance Company v. NLRB, 592 F2d, 595 100 LRRM 2260 (1979); NLRB v. Montgomery Ward & Co., Inc., 157 F2d 486 (8th cir. 1946) 19 LRRM 2008, Home Beneficial Life Insurance Co., 159 F2d 280 (4th cir. 1947) 19 LRRM 2208.

In the Liberty Mutual Insurance Company case, an employee (Agacinski), a salesperson for the Respondent insurance company sought to organize his fellow salespersons into an association of sales representatives. In addition to that activity, the court found that Agacinski also "threatened to be disruptive, declared war on management, missed appointments and refused to meet with his superiors as requested." The Court found that these latter activities were unprotected, and, therefore, Agacinski's discharge was lawful.

In the Montgomery Ward case, the Respondent therein was struck by its employees in Chicago. Its Kansas City employees also struck but returned to work the following day, although the Chicago employees remained on strike. Three employees in the Respondent's Kansas City billing department refused to process Chicago orders because they believed that an increase in Chicago orders had occurred for the purpose of breaking the strike in Chicago, though the evidence revealed that there was no increase in Chicago orders. The supervisor of the three employees discovered that they were not processing Chicago orders and told them they would have to do so or leave the plant. They refused and were discharged.

The Court held that "while those employees had the undoubted right to go on strike and quit their employment, they could not

continue to work and remain at their positions, accept the wages paid to them, and at the same time, select what part of their allotted tasks they care to perform of their own volition or refuse openly or secretly to do other work. [Citations omitted] Montgomery Ward, supra, p. 496.

The facts in the instant case are not analagous, as Dagoberto in fact decided to strike and leave the premises. Similarly in the Home Beneficial case, employees refused to report to their offices daily as the company rules required, and instead, agreed among themselves to report only two days a week. Some of the employees struck while others sought to continue their employment and at the same time defy the employer's rules. As to the latter, the Court held that when employees refuse to obey rules laid down by law-abiding management for the conduct of this business, such employees may be lawfully discharged. As to the former, though, the court held that an employer that denies further employment to employees merely because they have taken part in a strike performs an illegal act. Home Beneficial, supra, p. 285.

Respondent's position is that Gonzalez and his sub-crew properly belong in the category of workers who remain as employees and at the same time refuse to obey the rules of management.

However, for reasons set forth below, I find that Dagoberto can more properly be viewed as a striker who has been improperly discharged.

The cases cited by Respondent have in common fact situations whereby employees engaged in conduct, in addition to a work

stoppage, which caused their concerted activity to lose its protected status. Thus, workers that were lawfully discharged either disrupted the employer's normal business operations or they refused to do part of job yet expected to be paid for a complete job. Are there such facts in the instant case which would render Dagoberto's discharge lawful ? The answer, I believe, is no. in the work stoppage, initiated by Dagoberto, there was no effort to disrupt Respondent's operation except for the refusal to work itself. There was no violence or threat of violence. No effort was made on the part of the employees to deny Respondent access to or use of its property. The facts do not support the work stoppage as a partial strike. And even though the work stoppage took place on Respondent's property, that fact alone did not cause a disruption of Respondent's operation any more than if the work stoppage was off respondent's property and in any event Respondent decided, on its own, to shut down its operation of the day of the termination. Under these circumstances, I find that the work stoppage Gonzalez engaged in did not lose its protected status. Kenworth Trucks of Philadelphia, Inc., and Machinists Lodge 724, AFL-CIO, (1977) NLRB No. 122, 96 LRRM 1605.

The Board in a recent case, Royal Packing Company, 8 ALRB No. 16, has ruled on the respective rights of employees and employers when a work stoppage takes place. In Royal Packing Company, the ALO found that the employer's celery crew had engaged in a four-hour work stoppage because the celery the employer required them to pick was of a poor quality resulting in a reduction in their wages. Four days later the issue arose

again and the workers asked to be paid on a piece rate in the morning, but on an hourly rate in the afternoon when they were required again to pick poor quality celery. The employer's supervisor told the crew that "if you don't want to work, you're fired." The ALO concluded that the employer discharged the crew because of the work stoppage and that the work stoppage was protected concerted activity. While agreeing with the ALO's findings and conclusions, the Board affirmed the decision on different grounds. The Board first characterized the work stoppage as an economic strike, Id p. 2, and defined an economic strike as a "withholding of services by employees to induce their employer to effect a change in their wages, hours or conditions of employment. Id p. 2, fn. 2. The Board then went on to hold that "by their work stoppage the employees engaged in protected concerted activity in the form of an economic strike." Id p. 3.

The Board concluded by setting forth the rights and duties of an employer in an economic strike as follows:

When confronted with an economic strike, an employer is free to hire other workers to replace the striking employees at any time prior to an unconditional request by the strikers for reinstatement. [Citations omitted] However, an employer commits an unfair labor practice by discharging, laying off, or otherwise discriminating against employees for engaging in an economic strike. [Citations omitted] Here, credited testimony establishes that both crew foreman Villalobos and supervisor Solario told the employees, in response to their protected work stoppage, that they were "fired." By so discharging these workers, Respondent violated section 1153(a) of the Act. Id p. 3.

Similarly in the instant case, the facts clearly establish that Gonzalez engaged in an economic strike by engaging in a work stoppage in concert with other employees in protest of a

change in work conditions which would reduce their pay. Respondent discharged Dagoberto specifically for engaging in this work stoppage. Accordingly, I find that by discharging Dagoberto on September 23, Respondent violated Section 1153(a) of the Act.

I further find that Dagoberto sought reinstatement on September 24, and Respondent's failure to reinstate him is an additional violation of Section 1153(a) of the Act. Kendick Engineering, Inc., (1979) 244 NLRB 989, Weather Tee Corporation, (1978) 238 NLRB 1535.

The Alleged Discharge of Rosalio Contreras

Contreras's case presents a different factual situation than the Dagoberto case. The threshold question here is whether in fact there was a discharge.

On September 23rd, the evidence establishes that while Contreras did not initiate the work stoppage, he had joined it by the time the workers left Respondent's premises. Contreras was at that point an economic striker. The General Counsel does not claim Contreras was discharged on this date, nor would the facts support such a finding.

On the 24th of September, Contreras engaged in a further work stoppage in protest of Respondent's refusal to reinstate Dagoberto. This protest is in itself protected activity and as it is in protest of an unfair labor practice, Contreras at that point in time became an unfair labor practice striker.^{5/}

Yamamoto Farms, 7 ALRB No. 5.

5/. An unfair labor practice strike is an activity which is Initiated in whole or in part in response to the employer's unfair labor practices, in this case, Respondent's unlawful refusal to reinstate Dagoberto. P.P. Murphy Produce Co., 5 ALRB No. 63.

On this day when Contreras returned to work, Anuar testified that he told Contreras that Contreras could return to work, but Dagoberto could not. As indicated above, I credited Anuar's testimony regarding this conversation. While Contreras testified he did not have a conversation with Anuar, he did testify that he refused to work after he found out that Dagoberto was not allowed to work. General Counsel does not claim a discharge took place on this date.

General Counsel's position is that Contreras was finally discharged on September 25th. While Contreras testified that he believed he was discharged on this date, he did not testify as to any facts which caused him to form such a belief. Nor is there any other testimony in the record which would support a discharge on the 25th of September. Even by Contreras' own testimony, the only contact he had with any company personnel was when a security guard approached a car Dagoberto and his sub-crew were in and advised Dagoberto that he was not supposed to be on company property. Dagoberto and Contreras subsequently went to wait for their payroll checks to be issued and left the property after receiving their checks. No evidence is in the record regarding who requested the checks or why.

In analyzing the issue of Contreras' discharge, I have also considered whether the facts would support a finding of constructive discharge. Under the doctrine of constructive discharge an employer need not use the word "fired" in order for a discharge to occur. Rather, one of the tests of whether there has been a discharge depends upon the reasonable inferences that the employee could draw from the language used by the employer. NLRB v. Ridgeway Trucking Co. - F2d - (1980) 105 LRRM 2153. However, in reviewing the facts and drawing reasonable inferences

therefrom, I do not find that there has been a constructive discharge.

Respondent's position is that Contreras is a striker, either economic or unfair labor practice in nature, who went on strike in support of Dagoberto and has not applied for reinstatement.^{6/} Under Respondent's view, Contreras was never discharged.

The facts support this position except as earlier indicated Contreras is an unfair labor practice striker. It seems evident that considering all the facts on the three days in question, Respondent's efforts, so far as discharging anyone was concerned, focused only on Dagoberto. No facts were introduced which support General Counsel's theory that Respondent intended to discharge Contreras on the 25th of September, nor could a reasonable inference be drawn by Contreras based on the facts, that he was discharged. Accordingly, I will recommend that this part of the complaint involving a discriminatory discharge of Contreras be dismissed.

THE REMEDY

Having found that the discharge of Dagoberto Gonzalez violated Section 1153(a) of the Act, I shall recommend that Respondent cease and desist from like violations and take certain affirmative action designed to effectuate the policies of the Act. Specifically, I recommend that Respondent be ordered to offer Dagoberto Gonzalez reinstatement to his former job,

6/. As an unfair labor practice striker, should Contreras apply for reinstatement, he would be so entitled without prejudice to his seniority or other employment rights or privilege.

without loss of seniority, and to make him whole for any loss of pay or other economic losses he has suffered as a result of Respondent's unfair labor practices.

Upon the basis of the entire record, the findings of fact and conclusions of law, and pursuant to Section 1160.3 of the Act, I hereby issue the following recommended:

ORDER

Respondent, its officers, agents, successors and assigns shall:

1. Cease and desist from:

(a) Discharging, laying off, or otherwise discriminating against, any agricultural employee in regard to hire or tenure of employment or any term or condition of employment because he or she has engaged in any concerted activity protected by Section 1152 of the Act.

(b) In any like or related manner interfering with, restraining, or coercing any agricultural employee(s) in the exercise of the rights guaranteed them by Labor Code Section 1152.

2. Take the following affirmative actions which are deemed necessary to effectuate the policies of the Act.

(a) Immediately offer to Dagoberto Gonzalez full reinstatement to his former job or equivalent employment, without prejudice to his seniority or other employment rights or privileges

(b) Make whole Dagoberto Gonzalez for any loss of pay and other economic losses he has suffered as a result of his discharge on or about September 23, 1980, reimbursement to be made according to the formula stated in J & L Farms, (1980) 6 ALRB No. 43, plus interest thereon at a rate of 7 percent per annum.

(c) Preserve and, upon request, make available to the Board and its agents, for examination, photocopying, and otherwise copying, all payroll records, social security payment records, time cards, personnel records and reports, and all other records relevant and necessary to a determination, by the Regional Director, of the backpay period and the amount of backpay due under the terms of this Order.

(d) Sign the Notice to Agricultural Employees attached hereto and, after its translation by a Board agent into appropriate languages, reproduce sufficient copies in each language for the purposes set forth hereinafter.

(e) Mail copies of the attached Notice, in all appropriate languages, within 30 days after the date of issuance of this Order, to all employees employed by Respondent at any time during the period from September 23, 1980, until the date on which the said Notice is mailed.


(f) Post copies of the attached Notice, in all appropriate languages, for 60 consecutive days in conspicuous places on its property, the period and places of posting to be determined by the Regional Director, and exercise due care to replace any copy or copies of the Notice which may be altered defaced, covered, or removed.

(g) Arrange for a representative of Respondent or a Board agent to distribute and read the attached Notice, in all appropriate languages, to its employees on company time and property at time(s) and place (s) to be determined by the Regional Director. Following the reading, the Board agent shall be given the opportunity, outside the presence of supervisors

and management, to answer any questions the employees may have concerning this Notice or employees' rights under the Act. The Regional Director shall determine a reasonable rate of compensation to be paid by Respondent to all nonhourly wage employees in order to compensate them for time lost at this reading and during the question-and-answer period.

(h) Notify the Regional Director in writing, within 30 days after the date of issuance of this Order, of the steps Respondent has taken to comply therewith, and continue to report periodically thereafter, at the Regional Director's request, until full compliance is achieved.

Dated: April 2, 1982



BRIAN TOM
Administrative Law Officer

NOTICE TO AGRICULTURAL EMPLOYEES

After investigating charges that were filed in the Delano Regional Office, the General Counsel of the Agricultural Labor Relations Board issued a complaint that alleged that we had violated the law. After a hearing at which each side had an opportunity to present evidence, the Board found that we did violate the law by discharging the Dagoberto Gonzalez. on or about September 23, 1980. The Board has told us to post and publish this Notice. We will do what the Board has ordered us to do. We also want to tell you that:

The Agricultural Labor Relations Act is a law that gives you and all farmworkers these rights:

1. To organize yourselves;
2. To form, join, or help unions;
3. To vote in a secret ballot election to decide whether you want a union to represent you;
4. To bargain with your employer to obtain a contract covering your wages and working conditions through a union chosen by a majority of the employees and certified by the Board;
5. To act together with other workers to help or protect one another; and
6. To decided not to do any of these things.

WE WILL NOT interfere with, or restrain or coerce you in the exercise of your right to act together with other workers to help and protect one another.

SPECIFICALLY, the Board found that it was unlawful for us to discharge Dagoberto Gonzalez because he participated in a concerted work stoppage over wages on or about September 23, 1980.

WE WILL NOT hereafter discharge or lay off any employee for engaging in such concerted activities.

WE WILL reinstate Dagoberto Gonzalez to his former or substantially equivalent employment, without loss of seniority or other privileges and we will reimburse him for any pay or other money he has lost because of his discharge, plus interest computed at 7 percent per annum.

Dated:

SUPERIOR FARMS

By: _____
Representative (Title)

If you have a question about your rights as farmworkers or about this Notice, you may contact any office of the Agricultural Labor Relations Board. Our office is located at 627 Main St. , Delano, California 93215 The telephone number is (805) 725-5771.

This is an official Notice of the Agricultural Labor Relations Board, an agency of the State of California.

DO NOT REMOVE OR MUTILATE